

[10th JULY, 1764.]

INFORMATION

F O R

THOMAS MILLER of *Barskimming*, Esq;
his Majesty's Advocate, on behalf of his
Majesty; Pursuer:

A G A I N S T

DAVID KERR farmer and merchant in *Innerkip*,
THOMAS ORR farmer in *Nethertown* of *Innerkip*, JOHN
HAIR merchant in *Innerkip*, ALEXANDER BOAG in *Hill*
near *Innerkip*, THOMAS REID weaver in *Innerkip*, JOHN
HYNDMAN residenter there, and JOHN HUNTER cooper
there; Pannels.

THE Pursuer having been informed, That Colin Camp-
bell, an officer of the Customs, and Commander of the
Prince of Wales sloop in the service of the Revenue,
when at the village of *Innerkip* in the county of *Renfrew*,
along with a party of soldiers, and other persons, whom he had
carried there, of purpose to assist him in searching for and mak-
ing seizure of a large quantity of prohibited goods, which he
understood to have been recently lodged in that village, had
been assaulted in a very outrageous manner by a multitude of
people, in number above two hundred, and who had forcibly
A hindered

hindered and resisted him in the seizing or securing part of the prohibited goods, which had been apprehended by him and his party, did, after making the necessary enquiries for discovering the most guilty, consider it to be his duty to indict the Pannels, who are seven in number, as the persons of whose guilt he could have no doubt, from the enquiries that had been made.

As the offence appeared to the Pursuer not only to be punishable at common law, but to fall under the particular sanction of a Statute made in the eighth year of the reign of George I. entitled *An act to prevent the clandestine running of Goods, &c.* so he judged it proper to lay the Indictment both upon the common law and that Statute.

The fact charged in the Libel or Indictment is in substance, That Colin Campbel and his party having taken six casks of foreign spirits out of the house of John Hunter one of the Pannels, were, when carrying the spirits towards the shore, of purpose to put them on board the Prince of Wales cutter, which lay at anchor, attacked by a multitude of people, to the number of above two hundred, who had convoked upon that occasion, by their throwing stones, and otherways acting in a lawless and riotous manner, by which the said Colin Campbell and several of his assistants were very much hurt and bruised: And the Libel, after setting forth certain devices or stratagems followed by the said Colin Campbell and his party, to disperse the multitude or abate their fury, without success, and that they were at last obliged to use fire-arms in their own defence, does specify certain facts for showing, That two of the Pannels, *to wit*, Thomas Orr and David Kerr, were particularly active in the instigating and directing the riotous multitude in their assault.

The Pannels having appeared at the Bar upon the 9th instant, and the Libel having been read over to them, they severally pleaded *Not guilty*: And, thereafter, Counsel were heard upon certain exceptions taken to the relevancy of the Libel;
when

when, *inter alia*, it was maintained on behalf of the Pannels, That the Libel was not relevant so far as laid upon the Statute; because, when the Section of the Statute, a part of which was only recited in the Libel, is considered with attention, it would evidently appear, that the punishment enacted against those who hindered or resisted officers of the Revenue in the seizing or securing run-goods, did only apply to cases where five or more persons were passing with foreign goods, landed without payment of duties from the coast-side, or within twenty miles thereof: And which argument was endeavoured to be supported from another Section of the same Statute, by which a penalty of 40*l.* is enacted against all persons who assault, resist, oppose, molest, obstruct or hinder any officer of the Revenue in the due seizing or securing any spirits, &c. and which penalty could only be sued for in the Court of Exchequer.

It appeared justly to the Court to be of consequence, to have the Objection solemnly judged of and determined; and, with that view, Informations were ordered to be given in, and that for the Pursuer to be first lodged, that the Pannels might have an opportunity of seeing it.

That your Lordships may be the better enabled to judge of the Objection, and the argument upon it, it will be properly to recite the two Sections of the Statute.

The Section upon which the Libel is laid, stands in the following words; " And be it further enacted, by the authority
 " aforesaid, That from and after the said 25th day of March
 " 1722, all and every person and persons, who shall be found
 " passing (knowingly and willingly) with any foreign goods or
 " commodities, landed from any ship or vessel, without the
 " due entry and payment of the duties by Law charged there-
 " on, in his, her, or their custody, from any of the coasts of
 " this kingdom, or within the space of twenty miles of any
 " of the said coasts, and shall be more than five persons in
 " company, or shall carry any offensive arms or weapons, or
 " wear any vizard, mask, or other disguise, when passing with
 such

8^o. GEO. I.
 Cap. 18. § 6.

“such goods or commodities as aforesaid, or shall forcibly
 “hinder or resist any of the officers of the Custom-house or
 “Excise, in the seizing or securing any sorts or kinds of run-
 “goods or commodities, shall be deemed and taken to be run-
 “ners of foreign goods and commodities, within the meaning
 “of this present Act: And (being convicted of, or for any of
 “the said offences, for which he, she, or they so convicted
 “are, by this present Act, declared to be deemed and taken to
 “be runners of foreign goods and commodities,) shall be ad-
 “judged guilty of felony, and shall, for such his, her, or their
 “offence, be transported as a felon to some or one of his Ma-
 “jesty’s Colonies or Plantations in America, there to remain
 “for the space of seven years, in the same manner as felons are
 “appointed to be transported, by an Act made in the fourth
 “year of his Majesty’s reign, intituled, *An Act for the preventing*
 “*of robbery, &c.*”

In the subsequent Sections of the Statute, there are various
 regulations introduced for preventing the smuggling of foreign
 spirits, and the committing of frauds in British spirits. Then,
 in Section 24th, for removing a doubt that had been stirred, as
 to the persons that were intituled to seize foreign or British spi-
 rits; It is enacted, That they may be seized “by any officer
 “or officers of the Customs or Excise respectively, or by such
 “person or persons who are, or shall be, deputed or authorised
 “thereto, by warrant from the Lord Treasurer, &c.” And
 next follows the Section founded upon by the Pannels in these
 words:

- § 25. “And be it further enacted, by the authority aforesaid,
 “That if, from and after the 25th day of March 1722, any
 “person or persons whatsoever, shall assault, resist, oppose,
 “molest, obstruct, or hinder any officer or officers of the Cus-
 “toms or Excise in the due seizing or securing any brandy,
 “arrack, rum, spirits or strong waters, either foreign or Bri-
 “tish, or any foreign Excisable liquors, which by any officer
 “or officers of the Customs or Excise shall, or may, be seized
 by

“ by virtue, or in pursuance, of this or any other Act or Acts
 “ now in force, or hereafter to be made; or shall, by force or
 “ violence, rescue, or shall cause or procure to be rescued, any
 “ brandy, arrack, rum, spirits, or strong-waters, British or fo-
 “ reign, or any foreign Exciseable liquors, after the same shall
 “ have been seized by such officer or officers as aforesaid; or
 “ shall attempt or endeavour so to do; or shall at, or after
 “ such seizure, take, break, or otherwise destroy or damage
 “ any cask, vessel or bottle, containing such brandy, arrack,
 “ rum, spirits, or strong-waters, British or foreign, or such fo-
 “ reign Exciseable liquor, the party or parties so offending, shall,
 “ for every such offence, forfeit and lose the sum of 40 l.”

Upon examining the Section of the Statute upon which the Libel is laid, your Lordships will discover three distinct and separate offences to be enacted against.

1st, Five or more persons in company passing, knowingly and willingly, with any foreign goods or commodities, landed from any ship or vessel in their custody, from any of the coasts of this kingdom, or within the space of twenty miles of any of the said coasts.

2^{dly}, The carrying any offensive arms or weapons, or wearing any vizard, mask, or other disguise, when passing with such goods or commodities.

3^{dly}, The forcibly hindering or resisting any of the Officers of the Customs or Excise, in the seizing or securing any sorts or kinds of run-goods or commodities.

That these are so many distinct and separate offences is evident, not only from their being distinguished by the word *or*, but from the words in the law subjoined to the enumeration of them, *viz. being convicted of or for any of the said offences*; and still more evident from the absurdity that would follow, if the construction put upon the Statute by the Counsel of the Pannels was to be gone into.

The plea maintained for the Pannels, is, That the number of five persons, and their passing with foreign goods from the

coast, or within twenty miles thereof, must be understood to be repeated in the other alternatives of the Statute.

It was admitted for the Pannels, That where five or more persons are found passing with foreign goods as described in the first alternative, they are punishable with transportation for seven years, as the Statute directs.

Now, if that is so, and which cannot be denied, the Legislature must appear exceedingly absurd, in enacting the same punishment against *such* persons under the *same* circumstances, who should carry offensive arms or put themselves in disguise; for, if the number *five* was necessary for constituting the offence, their being together and passing with such goods and commodities, is of itself sufficient, whether they were armed or disguised or not: And therefore it is clear, That numbers could not be intended to be necessary for constituting the offence meant to be punished by the second alternative. If one person armed or disguised should pass with such goods, he is as much within the sanction of the Statute as if there were a dozen.

It is indeed true, That there is a relation between the first and second alternatives with regard to the place, *that is*, The person armed or disguised must be passing with goods from the coast, or within twenty miles thereof; and the relation is properly created and expressed in the second alternative by these words, *when passing with such goods or commodities as aforesaid*.

It is equally clear, That numbers have nothing to do with the third alternative; for, if *five* being together constitutes the offence, it would be nugatory and without meaning, to enact against their forcibly hindering or resisting an officer. And here it is particularly to be observed, that, with regard to *place*, there are no words in the third alternative that make a relation between it and the first, as is done between the first and second: On the contrary, the third alternative constitutes an offence, distinct and separate, and unrelated to the first. It is general, and consists in the *forcibly* hindering or resisting any Officer of the Revenue, in the seizing or securing run-goods: and, it is

is to be particularly adverted to, That this offence of hindering or resisting, is, in express words, made tantamount of the first alternative, by the persons guilty thereof, being "deemed and taken to be runners of foreign goods and commodities, with-
" in the meaning of this present Act."

The Argument for the Pannels upon the other clause of the Statute is in substance, That, as the Legislature had enacted a penalty of 40 *l.* against every person who should assault, resist, or hinder any Officer in the seizing or securing foreign spirits, it was absurd to suppose, That the Legislature, by the same Statute, meant to permit a criminal prosecution for that very offence, or to inflict so high a punishment as transportation; and therefore, to reconcile the two Sections of the Statute, it was necessary to understand the hinderance and resistance spoke of in the first Section, to concern only the case mentioned in the first alternative, *to wit*, where the goods were passing from the coasts, and that there were five or more persons present. And, it was further said, That if every kind of resistance or hinderance to officers in the execution of their duty, when possibly only made by one person, was to be understood to fall under the first Section, it might be the foundation of much severity against many of the Lieges.

The resisting or hindering Officers of the Revenue in the seizing or securing of run-goods, is an offence of which there may so many species or instances occur, less or more aggravated, that it is not possible for the wisdom of any Legislature to ascertain with precision an adequate punishment to the different kinds of that offence which might occur; and therefore, there does not appear to be either inconsistency or impropriety in our Legislature enacting, by this Statute, two different kinds of punishment against this offence; the greater only competent to be prosecuted in this Court, and the lesser in the Court of Exchequer. — The prosecutions in both Courts can only be carried on in the name of his Majesty's Advocate, which is an office that has been long filled by Gentlemen, who will not be thought or supposed to have any other object in such prosecutions

tions than justice, and who therefore the Legislature may be understood, by the double enactment appearing in this Statute, to have intrusted with a discretionary power of prosecuting for the one offence or the other, as the circumstances of the case seem to make requisite.

That such was the intendment of the Statute, will be imagined, appear abundantly plain, from the attending words used in the two Sections. — In the first Section the words are *forcibly hinder or resist*, which imply force and violence to some extent, and are descriptive of the most aggravated kinds of the offence. — In the second Section the words are, *assault, resist, oppose, molest, obstruct or hinder*; and, in this Section, *rescuing or procuring, attempting to secure, staying, breaking or destroying* the goods when seized, are also comprehended.

The Pursuer does not mean to say, That force and violence are not implied in assaulting, resisting, rescuing, &c. But what he maintains and submits to the consideration of the Court, is, That the Legislature, in the last Section, appears to have had in view the lesser or more innocent species of the offence; and therefore, that it was just to give a discretionary power of prosecuting either, for the penalty in the Court of Exchequer, or for the higher punishment in this Court, as the circumstances attending the offence seemed to make necessary and proper.

If your Lordships are not satisfied with this explanation of the Law, you will then further consider, Whether the Legislature, by the last Section, could mean to derogate from, or lessen the general enactment of the first Section, when, in the last Section, the punishment is limited to the offence, when committed as to foreign or British spirits only, which are the subject of many enactments in the preceeding Sections of the Statute; whereas the first Section is general, and comprehends all kinds of run or prohibited goods.

The Pursuer cannot perceive the Justice of the observation made for the Pannels, That the extending the first Section of the Statute to every kind of resistance, when possibly only made
by

by one, might be the foundation of much severity; because as it is apparent, great numbers have nothing to do with the last alternative, it must then be equally severe to prosecute a single person for resisting or hindering when passing with goods from the coast, or within twenty miles thereof, as when such resistance or hinderance should be made by such person when at a great distance.

It is indeed true, that it might be looked upon as a severity, if a person, for an *inconsiderable* resistance or hinderance, was to be prosecuted upon the first Section of the Statute. But it will be attended to, that the Statute itself has guarded against this, by using the word *forcibly*; and if the facts charged in the Libel are true, which your Lordships are bound to believe, in judging of the relevancy, there can be no doubt of Colin Campbell having been forcibly hindered, in securing the goods for his Majesty's use, which had been apprehended by him; and that few cases can well occur, where the punishment inflicted by the Law is more merited, than it is by the Pannels, if guilty.

As the relevancy of the Libel at common Law, tho' at first impugned in some degree, was at last given up by the Counsel for the Pannels, it is unnecessary to say any thing upon that subject here, and still less so, to take notice of various matters that were stated in the debate *foreign* to the question of *relevancy*, and only calculated to impress the minds of such of the Jury as might be present before their time of judging, which can only be after the evidence has been taken before them.

In respect whereof, &c.

J A. MONTGOMERY.

by one, might be the foundation of another severity; because as it is apparent, numbers have nothing to do with the last alternative, it must then be equally severe to prosecute a single person for resisting or hindering when passing with goods from the coast, or within twenty miles thereof, as when such resistance or hindrance should be made by such person when at a great distance.

It is need time, that it might be looked upon as a severity, if a person, for an unnecessary resistance or hindrance, was to be punished upon the first Section of the Statute. But it will be attended to, that the Statute itself has guarded against this, by using the word *forcefully*; and if the facts charged in the Libel are true, which your Lordships are bound to believe, in judging of the relevancy, there can be no doubt of Colin Campbell having been *forcefully* hindered, in passing the goods for his Majesty's use, which had been apprehended by him; and therefore cases can well occur, where the punishment inflicted by the Law is more merited, than it is by this Libel, if guilty.

As the relevancy of the Libel at common Law, tho' at first infringed in some degree, was at last given up by the Counsel for the Libel, it is unnecessary to say any thing upon that subject here, and still less so, to take notice of various matters that were stated in the debate, foreign to the question of relevancy, and only calculated to impress the minds of such of the Jury as might be present before their time of judging, which can only be after the evidence has been taken before them.

In witness whereof, &c.

J. A. MONTGOMERY.